No. 20-1568

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TIMOTHY H. EDGAR, RICHARD H. IMMERMAN, MELVIN A. GOODMAN, ANURADHA BHAGWATI, and MARK FALLON,

Plaintiffs-Appellants,

v.

JOHN RATCLIFFE, in his official capacity as Director of National Intelligence; GINA HASPEL, in her official capacity as Director of the Central Intelligence Agency; MARK T. ESPER, in his official capacity as Secretary of Defense; and PAUL M. NAKASONE, in his official capacity as Director of the National Security Agency,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Maryland

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STATEMENT OF ISSUES

1. Whether the district court had jurisdiction to entertain plaintiffs' facial challenge to the constitutionality of defendants' prepublication review policies.

2. Whether those policies comply with the First and Fifth Amendments.

STATEMENT OF THE CASE

A. The Prepublication Review System

1. The classification of national security information

"Since World War I, the Executive Branch has engaged in efforts to protect national security information by means of a classification system graded according to sensitivity." *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The system has been governed by a series of executive orders, the most recent of which is Executive Order 13,526. Classified National Security Information, 75 Fed. Reg. 707 (Dec. 29, 2009).

Information may be classified if an official with classification authority "determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security." Exec. Order No. 13,526 § 1.1(a)(4). Several designations may apply, depending on the harm that an unauthorized disclosure would cause. Information is classified as "Confidential" if its disclosure "reasonably could be expected to cause damage to the national security." *Id.* § 1.2(a)(3). It is deemed "Secret" if its disclosure "reasonably could be expected to cause serious damage to the national security." *Id.* § 1.2(a)(2). And the "Top Secret" designation is reserved for information "the unauthorized disclosure of which reasonably could be expected to

cause exceptionally grave damage to the national security." *Id.* § 1.2(a)(1). Information classified at any level may also be placed in a special access program and further designated as Sensitive Compartmented Information, or SCI, if it "concern[s] or [is] derived from intelligence sources, methods or analytical processes" that require protection "within formal access control systems." ODNI, Intelligence Community Directive 703 § D(2) (June 21, 2013), https://go.usa.gov/xwE7v.

Information may be classified only if it pertains to certain topics, such as "military plans, weapons systems, or operations," "intelligence activities," "foreign relations or foreign activities of the United States," or "scientific, technological, or economic matters relating to the national security." Exec. Order No. 13,526 § 1.4. Information may not be classified to "(1) conceal violations of law, inefficiency, or administrative error; (2) prevent embarrassment to a person, organization, or agency; (3) restrain competition; or (4) prevent or delay the release of information that does not require protection in the interest of the national security." *Id.* § 1.7(a).

Certain types of intelligence information are also statutorily protected from disclosure whether or not the information is classified. For example, 50 U.S.C. § 3605(a) states that no law "shall be construed to require the disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency," and 50 U.S.C. § 3024(i) requires the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure."

2. Standard nondisclosure agreements

Federal employees who need access to classified information are asked to sign one or more nondisclosure agreements as a condition of access, as required by Executive Order 13,526.

Employees who need access to classified information of any kind are generally asked to sign Standard Form 312 (JA140-141). They agree not to "divulge classified information" without having "verified that the recipient has been properly authorized … to receive it" or having "been given prior written notice of authorization … that such disclosure is permitted." JA140 ¶ 3.

Employees who need SCI access generally must sign Standard Form 4414 (JA143-144). They agree never to divulge SCI "to anyone who is not authorized to receive it without prior written authorization." JA143 ¶ 3. They also "agree to submit for security review," by the agency that granted them SCI access, "any writing or other preparation in any form, including a work of fiction, that contains or purports to contain any SCI or description of activities that produce or relate to SCI or that [they] have reason to believe are derived from SCI." *Id.* ¶ 4. This review serves "to give the United States a reasonable opportunity to determine whether the" proposed publication "sets forth any SCI." *Id.* ¶ 5.

Employees who sign either agreement acknowledge that unauthorized disclosures "could cause damage or irreparable injury to the United States." JA140 ¶ 3; *see*

JA143 ¶ 3 ("irreparable injury"). They recognize that their obligations apply both during employment "and at all times thereafter." JA140 ¶ 8; JA143 ¶ 9.[1]

3. Agency-specific prepublication review practices

This case involves the prepublication review policies of the Central Intelligence Agency (CIA), Department of Defense (DoD), National Security Agency (NSA), and Office of the Director of National Intelligence (ODNI). Each agency has a slightly different process, though they are similar. All four agencies may also refer proposed publications to other agencies that have equities at stake in a proposed disclosure. JA20 ¶ 33; JA24 ¶ 39; JA26 ¶ 45; JA28 ¶ 51.

a. All CIA employees sign a CIA-specific Secrecy Agreement, Form 368 (JA54-56), under which they promise "to submit for review by the [CIA] any writing or other preparation in any form, including a work of fiction, which contains any mention

[1] The record also contains DoD's Form 1847-1 (JA76-77), which is substantively identical to Form 4414, and Form 313 (JA127-131). Under Form 313, employees agree not to disclose classified information or information "in the process of a classification determination." JA127 ¶ 3. They also "agree to submit for review," before disclosing, "any writing or other preparation in any form, including a work of fiction, which contains any mention of intelligence data or activities[] or … any other information or material that might be based upon" classified information or information undergoing classification review. JA127-128 ¶ 5. "[T]he purpose of" this prepublication review "is to give the U.S. Government an opportunity to determine whether the information or material" contemplated for public disclosure "contains any information or material that [the employee has] agreed not to disclose." JA128 ¶ 6. Form 313 states that "the U.S. Government retains the right to disallow" the publication of "certain open-source information or citations where, because of the author's U.S. Government affiliation and position[,] the reference might confirm the classified content." JA128 ¶ 6. The agreement applies indefinitely. JA129 ¶ 13. The complaint does not allege that any plaintiff signed Form 313.

of intelligence data or activities, or contains any other information or material that might be based on" classified information. JA54 ¶ 5. "[T]he purpose of [this] review … is to give the [CIA] an opportunity to determine whether" the proposed publication "contains any information or material that [the employee has] agreed not to disclose." *Id.* ¶ 6. The agreement applies indefinitely. JA55 ¶ 13.

Agency Regulation (AR) 13-10 governs the review process. JA62-70. It reiterates that anyone subject to a review obligation must submit to the Agency's Publications Review Board "all intelligence-related materials intended for publication or public dissemination." JA63 § 2(b)(1). That obligation extends to material "that mentions CIA or intelligence data or activities or material on any subject about which the author has had access to classified information in the course of his employment or other contact with the Agency." JA65-66 § 2(e)(1). For former employees, "[t]he purpose of prepublication review is to ensure that information damaging to the national security is not disclosed inadvertently" (JA63 § 2(b)(2)), and the Board will review proposed publications "solely to determine whether [they] contain[] any classified information" (JA67 § 2(f)(2)). "When otherwise classified information is also available independently in open sources [that] can be cited by the author, the [Board] will consider th[at] fact in making its determination on whether that information may be published with the appropriate citations," but "the Agency retains the right to disallow certain open-source information or citations where, because of the author's Agency affiliation or position, the reference might confirm the classified content." JA68 § 2(f)(4).

The regulation provides that, "[a]s a general rule, the [Publications Review Board] will complete prepublication review for nonofficial publications within 30 days of receipt of the material," that "[r]elatively short, time-sensitive submissions" such as op-eds "will be handled as expeditiously as practicable," and that "[l]engthy or complex submissions may require a longer period of time for review." JA65 § 2(d)(4). Authors dissatisfied with the Board's decisions may appeal within the Agency. JA70 § 2(h)(1).

b. The Defense Office of Prepublication and Security Review conducts DoD's reviews, subject to DoD Instructions 5230.09 (JA88-96) and 5230.29 (JA98-107). For "former DoD employees and contractors," review serves "to ensure that information they intend to release to the public does not compromise national security as required by their nondisclosure agreements." JA91 § 1.2(g) (Instr. 5230.09). "[I]nformation submitted by DoD personnel acting in a private capacity or submitted voluntarily by non-DoD sources"—as opposed to information submitted by current DoD personnel in their official capacities—is reviewed solely "to ensure that classified information is not disclosed." JA101 § 2(e) (Instr. 5230.29, Encl. 2).

DoD advises authors to submit "papers and articles … at least 10 working days before" the anticipated publication and "[m]anuscripts and books … at least 30 working days" in advance. JA105 § 3(a) (Instr. 5230.29, Encl. 3). Authors dissatisfied with a determination may appeal within DoD. JA106 § 4(b) (Instr. 5230.29, Encl. 3).

c. The NSA's review process is guided by Policy 1-30 (JA113-125), which implements DoD Instruction 5230.09 (*see* JA113). The policy states that former NSA

employees may publish materials using unclassified information "approved for public release" but must submit proposed publications for review "where compliance with" that requirement "is in doubt." JA114-115 § 2; JA118-119 § 6(b); JA120 § 10(a). Because NSA is statutorily authorized to withhold certain intelligence information whether or not it is classified, as noted above, not all unclassified information is "approved for public release." *See* JA124 § 27(b). Like the CIA's regulation, Policy 1-30 states that information available "from classified sources and also independently from open sources" may be released if the author "can cite an adequate open-source publication," but only where the release "will not cause additional damage to national security through confirmation of previous unauthorized releases." JA115 § 3(b).

The policy states that NSA "shall, as practicable," complete its review "within 25 business days" of receiving a proposed publication. JA119 § 6(b)(7). Authors dissatisfied with a determination may appeal within NSA. *Id.* § 7.

d. Finally, ODNI's review process is governed by Instruction 80.04 (JA133-138), which provides for former ODNI employees to submit any "publication that discusses the ODNI, the [Intelligence Community], or national security." JA134 § 6. The regulation explains that "ODNI has a security obligation and legal responsibility … to safeguard sensitive intelligence information and prevent its unauthorized publication." *Id.* ODNI's policy is to "complete a review of non-official publication requests no later than 30 calendar days from the receipt of the request, as priorities and resources allow."

JA136 § 6(C)(2)(b) (emphasis omitted). Dissatisfied authors may appeal within ODNI. JA137 § 6(E).

B. This Action

Plaintiffs are five former employees of the CIA, DoD, and ODNI. They brought this suit against the heads of those agencies and the NSA in April 2019, alleging that the review obligations the agencies impose on former employees are facially unconstitutional. No plaintiff is a former NSA employee, but one plaintiff's publication was referred to the NSA for review. JA31 ¶ 63.

The complaint does not allege that any plaintiff has a proposed publication pending review, nor do plaintiffs seek relief as to any particular past review. Rather, plaintiffs level sweeping claims that the agencies' prepublication review processes violate the First and Fifth Amendments, and they seek declaratory and injunctive relief. The complaint alleges the following facts.

1. Plaintiff Timothy Edgar was an ODNI employee from 2006 to 2013 and held a Top Secret/SCI clearance. JA30 ¶¶ 58-59. He has since submitted for review various "blog posts and op-eds." *Id.* ¶ 61.

In October 2016, Edgar submitted a manuscript entitled *Beyond Snowden: Privacy, Mass Surveillance, and the Struggle to Reform the NSA*. JA30 ¶ 62. ODNI completed review in January 2017. JA31 ¶¶ 63-64. Edgar alleges that some of the required redactions "related to events that had taken place, or issues that had arisen, after [he] had left

government," and that others "related to facts that were widely discussed and acknowledged though perhaps not officially confirmed." *Id.* ¶ 64. Although Edgar "disagreed with some of the mandated redactions," he declined the opportunity to "challeng[e] them," allegedly because he did not want to delay publication and "believed that maintaining a good relationship with reviewers at the ODNI was important to getting future manuscripts cleared in a timely fashion." *Id.*

Edgar claims that he "plans to continue writing about matters relating to intelligence and cybersecurity" and "anticipates submitting at least some" publications for review. JA31 ¶ 65. He complains that the review requirement "has dissuaded him from writing some pieces that he would otherwise have written[] and has caused him to write others differently than he would otherwise have written them." JA32 ¶ 66.

2. Plaintiff Richard H. Immerman was an ODNI employee between 2007 and 2009 and held a Top Secret/SCI clearance. JA33 ¶¶ 69, 71. He has since submitted for review various "book manuscripts, articles, papers, public talks, and academic syllabi." *Id.* ¶ 72.

In January 2013, Immerman submitted a manuscript entitled *The Hidden Hand: A Brief History of the CIA*. JA34 ¶ 73. ODNI referred portions to CIA for review and completed review in July 2013. *Id.* ¶¶ 74-75. Of the proposed redactions, Immerman asserts that some "related to information that had been published previously by government agencies," others related to information for which Immerman cited public sources, and many "related to events that had taken place, or issues that had arisen, after

[he] had left government." *Id.* ¶ 75. After Immerman appealed, however, ODNI "informed him that he could publish a significant portion of the" redacted text. JA35 ¶ 77. CIA officials, too, agreed "that some of the redactions" the CIA had proposed "were unnecessary." *Id.* ¶ 78. Immerman published his book—including "roughly eighty percent of the material that the agencies had originally redacted"—in 2014. *Id.*

Immerman claims that he "plans to continue publishing academic articles, books, and op-eds, at least some of which will trigger prepublication review obligations," and that he "would publish more" if not for the "burdens and uncertainties associated with prepublication review." JA35-36 ¶¶ 79-80.

3. Plaintiff Melvin Goodman is a former longtime employee of the CIA and held a Top Secret/SCI clearance. JA37 ¶¶ 82-83. He has since "submitted multiple works to the CIA for prepublication review," including "nine books." JA37-38 ¶¶ 85, 87. In 2017, Goodman alleges, the CIA "took eleven months to review a manuscript" entitled *Whistleblower at the CIA*, in which Goodman "provided an account of his experience as a senior CIA analyst." JA38 ¶ 89. For "most of" Goodman's books, however, "the prepublication review process … took less than two months." *Id.* Goodman believes that the CIA's redactions of *Whistleblower at the CIA* "were intended to spare the agency embarrassment" and that the CIA required him to excise passages of the manuscript for which he cited "press accounts." JA39 ¶ 90.

Goodman claims that he "intends to submit" for review "those portions of any future manuscripts that deal with intelligence matters," but that he worries the CIA "will

demand that he redact material unwarrantedly." JA39-40 ¶ 93. He also worries "that the delay associated with prepublication review will jeopardize his book contracts and render his publications less relevant." *Id.* He claims that, in a recent manuscript, he "avoided discussing certain public-source information about" the current CIA Director "to avoid conflict with and delays from the agency's prepublication review office." JA39 ¶ 92.

4. Plaintiff Anuradha Bhagwati is a former Marine Corps officer who was cleared to receive Secret information. JA40-41 ¶¶ 94, 96. She published a book entitled *Unbecoming: A Memoir of Disobedience*, describing her "experiences with misogyny, racism, and sexual violence in the military." JA41 ¶ 98. Bhagwati did not submit her recent book and "has no plans to submit any future work to prepublication review," although she expresses concern that DoD "might at any point choose to sanction her for failing to submit to prepublication review." JA40-41 ¶¶ 96, 99.

5. Finally, plaintiff Mark Fallon is a former employee of DoD and other agencies, who held Top Secret and Top Secret/SCI clearances. JA42-43 ¶¶ 100-102. He has since "submitted many" publications to DoD for review. JA43 ¶ 103.

In 2016, Fallon completed a manuscript entitled *Unjustifiable Means*, concerning "the George W. Bush administration's policies relating to the interrogation and torture of prisoners." JA43 ¶ 104. Fallon claims that the manuscript relied on public information and that he "was confident that [it] did not contain properly classified information," but DoD informed him that he "was required to submit [it] for review." JA43-

44 ¶¶ 104, 106. Fallon submitted the manuscript for review on January 4, 2017. JA44 ¶¶ 107. Despite knowing that the book could not be published until review was complete, Fallon agreed with his publisher to a publication date of March 7, 2017. *Id.* The agencies to which DoD referred the manuscript identified numerous necessary redactions, and review was not complete until August 2017. JA44-45 ¶¶ 108, 110.

Fallon alleges that the redactions "were arbitrary, haphazard, and inconsistent," that he believed some were "intended to protect the CIA from embarrassment," and that some related to public sources. JA45 ¶ 110. He likewise believes that DoD's redactions of a later publication "were motivated by political disagreement with" his "perspective on torture." JA46 ¶¶ 114.

Fallon alleges that because of the 2017 review, "he is unsure whether he is willing to embark on writing another book," and that he incurred personal costs as a result of the delay. JA45-46 ¶ 112. He says he "has declined offers to author op-eds and write articles on topics of public concern" because of the delay associated with prepublication review, and he claims to be "unsure how his prepublication review obligations apply in academia." JA47 ¶ 118. But he has recently "submitted numerous shorter works" and a book chapter for prepublication review. JA46 ¶¶ 113-114.

C. The District Court's Decision

The district court granted the government's motion to dismiss. *Edgar v. Coats*, 454 F. Supp. 3d 502 (D. Md. 2020).

The court rejected plaintiffs' theory that they have standing because "they are subject to government licensing schemes that invest executive officers with overly broad discretion." *Id.* at 523-525. The court also cast doubt, *id.* at 527 n.7, on plaintiffs' theory that they "face a credible threat of sanctions if they refuse to submit their work for" prepublication review, *id.* at 523. The court concluded, however, that plaintiffs have standing on the theory that defendants' prepublication review policies "have a chilling effect on protected speech." *Id.* at 523, 525-527. It further held that plaintiffs' claims are ripe, even though they do not challenge particular prepublication review determinations. *Id.* at 529-530.

On the merits, however, the district court held that plaintiffs failed to state a claim. As to plaintiffs' First Amendment claim, the court explained that the Supreme Court's decision in *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam), "controls this case." 454 F. Supp. 3d at 532. The court explained that plaintiffs "disregard" *Snepp* and the "body of case law" interpreting it. *Id.* The court also rejected plaintiffs' vagueness claim. "Plaintiffs' primary objection to the [prepublication review] policies," the court observed, "is their breadth rather than any difficulties [p]laintiffs have in understanding what they require." *Id.* at 539. The court noted that plaintiffs' ability to seek guidance from their former agencies mitigates any vagueness concern. *Id.* at 540.

SUMMARY OF ARGUMENT

I. The district court lacked jurisdiction because plaintiffs lack standing and their claims are unripe.

As the court recognized, plaintiffs cannot establish standing on the theory that prepublication review is a licensing scheme. That theory is limited to prior restraints, and prepublication review is not a prior restraint.

The theory the court accepted—that plaintiffs have standing because defendants' policies chill their expression—is equally unfounded. Plaintiffs do not challenge the basic requirement of prepublication review, which the Supreme Court approved in *Snepp*. They challenge particular features of defendants' policies that they regard as beyond the scope of *Snepp*. But the chilling effects that plaintiffs allege are not associated with those features of defendants' policies; they arise from the basic requirement of review.

Even if plaintiffs had standing, moreover, their claims are unfit for judicial resolution. Article III allows federal courts to adjudicate only concrete disputes. Instead of challenging particular prepublication review decisions, plaintiffs ask this Court to address sweeping accusations based on generalities. Article III forbids such premature suits.

II. Plaintiffs' claims also fail on the merits. This case is resolved by *Snepp*, which rejected a challenge to a prepublication review requirement materially like those challenged here. Plaintiffs make little attempt to distinguish *Snepp*'s facts or legal conclusions. Instead, they argue that the Supreme Court did not consider the issues presented here. But plaintiffs' arguments were raised before the Supreme Court; the Court simply did not see them as worthy of extensive discussion.

To the extent *Snepp* does not fully resolve this case, it at least establishes that the relevant question is whether defendants' policies are "a reasonable means for protecting" the government's interests in safeguarding confidential national-security information and the appearance of confidentiality that is critical to defendants' intelligence activities. 444 U.S. at 509 n.3. Plaintiffs ask the Court to impose a more stringent standard. They argue that prepublication review is a prior restraint, but that argument has been repeatedly rejected. Plaintiffs also suggest that *Snepp*'s reasonableness standard was impliedly altered by *United States v. National Treasury Employees Union* (*NTEU*), 513 U.S. 454 (1995). But this Court's role is to follow *Snepp*, not question its consistency with *NTEU*, and at any rate the differences between the *Snepp* and *NTEU* standards are not meaningful here.

Plaintiffs fail to show that defendants' policies are unreasonable. The scope of the policies is neither overbroad nor impermissibly vague. Nor are the review standards. Plaintiffs' contrary arguments rest largely on inaccurate descriptions of the policies. For example, plaintiffs suggest that defendants assert the authority to forbid the publication of public-domain material that is not classified or statutorily protected, when in fact the policies properly forbid the publication of still-classified information that has entered the public domain improperly, such as through a leak or hacking incident. And plaintiffs repeatedly mischaracterize DoD's review policies for former employees, notwithstanding defendants' disavowal of the interpretation that plaintiffs assert.

STANDARD OF REVIEW

This Court reviews de novo a ruling on a motion to dismiss for lack of jurisdiction and for failure to state a claim. *Doe v. Meron*, 929 F.3d 153, 163 (4th Cir. 2019).

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION

A. Plaintiffs Lack Standing

To establish standing at the pleading stage, plaintiffs must plausibly allege an injury that is "'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Plaintiffs "seeking prospective injunctive relief 'may not rely on prior harm' to establish Article III standing"; they must "'establish an ongoing or future injury in fact.'" *Abbott v. Pastides*, 900 F.3d 160, 176 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1292 (2019). And a "'threatened injury must be *certainly impending* to constitute injury in fact'"; "'[a]llegations of *possible* future injury' are not sufficient." *Clapper*, 568 U.S. at 409.

Plaintiffs have not met that standard. Critically, they do not claim the Constitution precludes *every* system of prepublication review, presumably because such a claim would ignore *Snepp*. Rather, plaintiffs claim that defendants' policies are flawed in particular ways—affording excessive discretion, lacking procedural safeguards, and providing insufficient notice of what must be submitted—that in plaintiffs' view distinguish

this case from *Snepp*. *See* Br. 18-19. But even if plaintiffs would have standing to challenge the basic requirement of review, they cannot have standing to challenge the particular alleged inadequacies unless they can plausibly identify a "'concrete, particularized, and actual or imminent'" injury that is "'fairly traceable to'" those inadequacies "'and redressable by a favorable ruling.'" *Clapper*, 568 U.S. at 409; *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("[A] plaintiff must demonstrate standing for each claim he seeks to press."). They allege no such injury.

One plaintiff, Anuradha Bhagwati, has never submitted publications for review, never intends to do so, and has never been threatened with sanctions for not doing so. *See* JA40-41 ¶¶ 96, 99. She claims DoD "might at any point choose to sanction her for failing to submit to prepublication review" (JA41 ¶ 99) but fails to explain why that is a reasonable concern (let alone "imminent," *Clapper*, 568 U.S. at 409). She lacks standing.

The other plaintiffs all allege that they have submitted and intend to submit works for review. Of plaintiffs' three theories of standing (at 51-54), the district court was correct to reject one and cast doubt on another, but incorrect to accept the third.

1. Prepublication review is not a licensing scheme

Plaintiffs principally argue (at 51-54) that they have standing because prepublication review is a "licensing scheme[]." "[W]hen a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." *City of Lakewood v. Plain Dealer Publ'g Co.*,

486 U.S. 750, 755-756 (1988). But the district court was correct to hold (454 F. Supp. 3d at 523-525) that plaintiffs' challenge cannot rest on that theory for several reasons.

First, prepublication review is not akin to "a licensing statute," *City of Lakewood*, 486 U.S. at 755. When the Supreme Court stated that plaintiffs have standing to challenge "licensing" schemes, the first case it cited was *Freedman v. Maryland*, 380 U.S. 51 (1965), a centerpiece of prior-restraint jurisprudence that addressed a film censorship regime. But as discussed below (at 30-31) prepublication review is not "a prior restraint in the traditional sense"—*i.e.*, a restraint of the type at issue in *Freedman*. *McGehee v. Casey*, 718 F.2d 1137, 1147 (D.C. Cir. 1983); *see, e.g.*, *Wilson v. CIA*, 586 F.3d 171, 183 (2d Cir. 2009). Rather, by agreeing to review, employees waive any contrary right under the First Amendment.

Second, defendants' review policies do not give government officials "unbridled discretion … over whether to permit or deny expressive activity," *City of Lakewood*, 486 U.S. at 755. The policies provide that works are to be reviewed for narrow, specified national-security purposes. *See infra* pp. 42-43.

Finally, even if the basic requirement of review could be regarded as a licensing regime, the nature of plaintiffs' claims—challenges to particular features of defendants' policies that supposedly distinguish this case from *Snepp*—means that plaintiffs must show they are injured by *those features* rather than by the review requirement as a whole. But plaintiffs' licensing theory has nothing to do with those specific features; it would at most support standing to challenge the requirement as a whole.

2. Plaintiffs fail to explain how their expression is chilled by the particular features of defendants' policies that they challenge

The theory the district court accepted—that plaintiffs have standing because defendants' policies chill their expression—is equally flawed.

First Amendment plaintiffs may establish injury in fact by showing "self-censorship, which occurs when a claimant 'is chilled from exercising her right to free expression.'" *Benham v. City of Charlotte*, 635 F.3d 129, 135 (4th Cir. 2011). But a plaintiff's subjective "'fear that … [a government] agency might in the future take some … action detrimental to'" her is insufficient. *Cooksey v. Futrell*, 721 F.3d 226, 236 (4th Cir. 2013). Rather, "[g]overnment action will be sufficiently chilling when it is 'likely [to] deter a person of ordinary firmness from the exercise of First Amendment rights.'" *Benham*, 635 F.3d at 135.

Plaintiffs fail to show that the challenged features of defendants' policies would cause any objectively reasonable chill. Many of the harms plaintiffs assert are associated not with the particular features they challenge but with the basic requirement of review, which the Supreme Court upheld in *Snepp* and which plaintiffs accordingly do not challenge. That is true, for example, of plaintiff Immerman's claim that he "would publish more" if not for the "burdens and uncertainties associated with prepublication review," JA36 ¶ 80, plaintiff Fallon's claim that he "has declined offers to author op-eds and write articles on topics of public concern" because of his review obligation, JA47 ¶ 118, and plaintiff Edgar's claim that the review requirement "has dissuaded him from

writing some pieces that he would otherwise have written[] and has caused him to write others differently," JA32 ¶ 66. An author might plausibly choose to avoid the need for review by avoiding subjects that would trigger her review obligation, or by not publishing at all, but those are unavoidable consequences of any prepublication review system; they are not traceable to the features challenged here.

Plaintiffs' few attempts to link alleged harms more specifically to the alleged defects are no more persuasive. Plaintiffs Edgar and Goodman, for example, suggest that the supposedly excessive discretion given to reviewers has made them hesitant to write about certain subjects or challenge proposed redactions, for fear of creating "conflict with" or jeopardizing "a good relationship with" reviewers. JA31 ¶ 64; JA39 ¶ 92. But plaintiffs plead no factual basis to believe that submitting work for which reviewers seek redactions, or appealing such redactions, is likely to prejudice the review of future submissions. That is particularly true because the right of appeal means that no individual reviewer has the last word. Indeed, the complaint makes clear that the appeal process is effective. *See* JA35 ¶ 78 (Immerman's appeals led to the restoration of "roughly eighty percent of the material that the agencies had originally redacted"). And any desire to avoid the unpleasantness of disagreeing with a reviewer is not an objectively reasonable deterrent to publication. *Cf. The Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410, 419 (4th Cir. 2006) ("a reporter of ordinary firmness" would not be "chilled by a politician's refusal to comment or answer questions on account of the reporter's previous reporting").

Finally, plaintiffs fail to account for the purpose of prepublication review: preventing authors from making disclosures that can expose them to serious penalties. Whatever "burden and uncertainties" may be "associated with prepublication review" (JA35-36 ¶¶ 79-80) pale in comparison to the uncertainties of publishing information that could subject the author to significant penalties if he incorrectly assesses its classified status. If review produces no redactions, then the author suffers no prejudice other than a generally short delay—but if the agency considers redactions necessary to avoid disclosing classified information, the author has escaped a far worse consequence. The D.C. Circuit has thus concluded that prepublication review "reduces any disfavored chilling effect," because it "alleviates a former [employee's] fear that his disclosure of non-sensitive information might result in liability." *McGehee*, 718 F.2d at 1147; *see also Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1441 (D.C. Cir. 1996) ("[I]f publication without [a] change could be punished after the fact … , then presumably the employee is not made worse off by having advance notice of the government's view.").

3. Plaintiffs are under no credible threat of criminal or civil penalties

That leaves the equally meritless theory, which plaintiffs address only in a footnote (at 54 n.9), that they have standing because they are subject to a "credible threat" of prosecution if they fail to comply with their review obligations. The credible-threat theory allows a plaintiff to bring a pre-enforcement challenge to a law "where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional

interest, but proscribed by a statute,'" and "'there exists a credible threat of prosecution'" under the law at issue. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). But plaintiffs do not allege any intention to engage in the proscribed conduct of defying their review obligations, which is why the district court observed that the credible-threat theory "is an awkward fit for this case." 454 F. Supp. 3d at 527 n.7. And even if plaintiffs did intend to defy their review obligations, no "prosecution," *id.*, or even a civil penalty action could be brought against them merely for that reason.[2] They could be prosecuted or subjected to other penalties if they were to publish classified information, but that is what prepublication review serves to prevent.

B. Plaintiffs' Claims Are Unripe

The district court also lacked jurisdiction because plaintiffs' claims are not ripe for review. "Like standing, the ripeness doctrine originates in the 'case or controversy' constraint of Article III." *South Carolina v. United States*, 912 F.3d 720, 730 (4th Cir. 2019) (some quotation marks omitted), *cert. denied*, 140 S. Ct. 392 (2019). "[W]hether a claim is ripe turns on the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* (quotation marks omitted). "To be fit for judicial review, a controversy should be presented in a 'clean-cut and concrete form.'" *Id.* The ripeness doctrine, like the broader case-or-controversy requirement, reflects the fact that "[c]ourts cannot make well-informed decisions when legal issues

[2] They could be subjected to a constructive trust on their profits, but that is not a penalty. *See United States v. Bolton*, 2020 WL 5866623, at *12 (D.D.C. Oct. 1, 2020).

do not arise out of the facts of a real case." *American Library Ass'n v. Barr*, 956 F.2d 1178, 1197 (D.C. Cir. 1992).

Plaintiffs' claims are paradigmatically unripe. In essence, plaintiffs allege that because they believe they have been treated unfairly in the past, they may be treated unfairly in the future. But a court cannot assess whether plaintiffs' treatment has been unfair, let alone whether it will be unfair, in the absence of a concrete factual dispute. For example, a six-month review process may be unwarranted or entirely reasonable, depending on factors like the length of a proposed publication, the sensitivity of its subject matter, and the care the author has taken to cite public sources. By the same token, the redaction of information that has appeared in the public domain may be improper if the information was official released, but proper if the information was leaked and its veracity remains unconfirmed (such that an author with security clearance would appear to verify the information by discussing it). *See infra* pp. 44-45.

Yet plaintiffs' brief is almost devoid of reference to concrete facts, even the past experiences of plaintiffs themselves. Instead, plaintiffs level sweeping accusations—for example, the accusation (at 1) that "[d]efendants' censorial decisions are often arbitrary, unexplained, unrelated to national security concerns, or influenced by authors' viewpoints"—without reference to concrete disputes. Such arguments cannot be resolved in the abstract. *Cf. Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1028 (9th Cir. 2012) (en banc) (explaining, in applying a bar to review of veteran's benefit claims, that courts could not "resolve whether the [Veterans Administration] acted in a timely

and effective manner in regard to the provision of mental health care without evaluating the circumstances of individual veterans and their requests for treatment, and determining whether the [Veterans Administration] handled those requests properly").

Nor would plaintiffs suffer any material "hardship," *South Carolina*, 912 F.3d at 730, if required to litigate their claims in the context of a concrete dispute. Plaintiffs who are dissatisfied with review decisions can challenge them in court. *See United States v. Marchetti*, 466 F.2d 1309, 1317 (4th Cir. 1972); *see also, e.g.*, *Snepp*, 444 U.S. at 513 n.8; *Wilson*, 586 F.3d at 185; *McGehee*, 718 F.2d at 1148. "Such judicial review is necessarily deferential because the designation and protection of classified information 'must be committed to the broad discretion of the agency responsible,'" *Wilson*, 586 F.3d at 185, but it is not toothless: The court must determine "from the record, *in camera* or otherwise, that the [agency] in fact had good reason to classify, and therefore censor, the materials at issue," *McGehee*, 718 F.2d at 1148. Proceedings of this nature are not uncommon. *See, e.g.*, *Shaffer v. Defense Intelligence Agency*, 102 F. Supp. 3d 1 (D.D.C. 2015) (partially upholding review decision by Defense Intelligence Agency); *Berntsen v. CIA*, 618 F. Supp. 2d 27 (D.D.C. 2009) (upholding CIA's decision); *Wilson v. McConnell*, 501 F. Supp. 2d 545 (S.D.N.Y. 2007) (same), *aff'd*, 586 F.3d 171. Plaintiffs may also sue on the ground that review is taking too long. *See, e.g.*, *Bakos v. CIA*, 2019 WL 3752883 (D.D.C. Aug. 8, 2019) (parties negotiated resolution after suit was brought). Given these alternative avenues for relief, plaintiffs' claims are not fit for resolution in this context.

II. PLAINTIFFS' CLAIMS FAIL AS A MATTER OF LAW

Plaintiffs' claims also fail on the merits. In *Snepp*, the Supreme Court upheld the CIA's prepublication review requirement—which was materially like the policies at issue—as "a reasonable means for protecting" the government's "compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." 444 U.S. at 509 n.3. Even if *Snepp* does not fully dispose of plaintiffs' claims, it provides the governing standard: reasonableness. And plaintiffs fail to show the policies are unreasonable, as to either their scope or the standards for review. The policies are reasonable and sufficiently clear, and authors have adequate procedural recourses to protect their interests in free expression.

A. *Snepp* Resolves This Case In The Government's Favor

The district court was right to begin and end its First Amendment analysis with *Snepp*. 454 F. Supp. 3d at 530-537. *Snepp* rejected similar arguments against the CIA's similar prepublication review requirement.

1.a. *Snepp* involved a former CIA agent, Frank W. Snepp III, who had upon joining the Agency "executed an agreement promising that he would 'not … publish … any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment … without specific prior approval by the Agency.'" 444 U.S. at 508. When he left the CIA, Snepp signed

another agreement "reaffirm[ing] his obligation 'never' to reveal 'any classified information, or any information concerning intelligence or CIA that has not been made public by CIA,'" without the CIA's consent. *Id.* at 508 n.1. He nonetheless published a book about the CIA's activities in Vietnam without submitting it for review. *Id.* at 507. The government sued, seeking "a declaration that Snepp had breached the contract, an injunction requiring [him] to submit future writings for prepublication review, and … a constructive trust" on his profits from the publication. *Id.* at 508. After the district court enjoined unauthorized publications and imposed a constructive trust, this Court affirmed the injunction but reversed the constructive trust. *United States v. Snepp*, 595 F.2d 926 (4th Cir. 1979). It reasoned "that Snepp had a First Amendment right to publish unclassified information" and that, by the government's concession, "Snepp's book divulged no classified intelligence." 444 U.S. at 509-510.

The Supreme Court reversed, holding that both the injunction and the constructive trust were proper. 444 U.S. at 516. Most saliently, the Court rejected the argument that Snepp's secrecy agreement was "unenforceable as a prior restraint on protected speech." *Id.* at 509 n.3. The Court explained that Snepp had signed the agreement "voluntarily" and that it was "a reasonable means for protecting" the government's "compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Id.* The Court further held that Snepp's

violation of his review obligation did "not depend upon whether his book actually contained classified information." *Id.* at 511. It explained that when a former government employee "relies on his own judgment about what information is detrimental" to national security, "he may reveal information that" a government agency, "with its broader understanding of what may expose classified information and confidential sources[,] could have identified as harmful." *Id.* at 512.

b. This case is resolved by *Snepp*, because the policies challenged here are materially like the one in *Snepp*. There, as here, a former intelligence-agency employee was subject to a lifelong review requirement for a broad category of material: "any information or material relating to the [agency], its activities or intelligence activities generally." 444 U.S. at 508. And most if not all the features that plaintiffs perceive as defects of the prepublication review regimes at issue here, such as the nature of their review criteria, were equally present in *Snepp*. Indeed, as discussed below, most of plaintiffs' arguments here were raised and rejected in *Snepp*.

To the extent plaintiffs' claims rely on specific features of their own situation, those too are materially indistinguishable from *Snepp*. For example, plaintiffs emphasize (at 16) that Snepp was "a former CIA officer who had been granted access to some of the government's most closely held secrets." But four of the five plaintiffs here held Top Secret clearances. JA30 ¶ 59; JA33 ¶ 71; JA37 ¶ 83; JA43 ¶ 102. The one who did not is plaintiff Bhagwati, who has never submitted publications for review and never intends to do so (JA40-41 ¶¶ 96, 99)—and even she held a Secret clearance (JA40 ¶ 96),

which gave her access to information the disclosure of which "reasonably could be expected to cause serious damage to the national security," Exec. Order No. 13,526 § 1.2(a)(2).

2. Plaintiffs seem to recognize there is little factual difference between this case and *Snepp*. Instead, they contend (at 13-19) that *Snepp* did not address the issues here. That is incorrect.

a. Plaintiffs principally attempt to cast *Snepp* as a decision "focused narrowly on a question of remedy" (Br. 13-14), namely the propriety of a constructive trust. Thus, plaintiffs say, the Supreme Court did not consider the permissible breadth of a review requirement or the standards and procedures for review.

But in reality, the Supreme Court faced almost exactly the same arguments in *Snepp* as plaintiffs raise here. Snepp's petition for certiorari characterized his review obligation as "a classic system of prior restraint," bearing "a heavy presumption against its constitutional validity." Pet. for Cert. *13-16, *Snepp v. United States*, No. 78-1871, 1979 U.S. S. Ct. Briefs LEXIS 6 (U.S. June 18, 1979) (Snepp Pet.). Snepp argued that the CIA's "regime of censorship impose[d] an intolerable burden on [his] right," and that of "other CIA employees[,] to publish their views on matters of great public concern and on the right of the public to receive such information." *Id.* at *14. He sought to demonstrate the "sweep[ing]" breadth of the review obligation by noting that it "even reache[d] the fictional short story and reflective essay" he had written. *Id.* at *14-15. He claimed that this Court's prior ruling defied "the principle that where government

regulation affects First Amendment activity, … any licensing authority must be guided by 'narrow, objective and definite standards.'" *Id.* at *21. And his amici emphasized that the review regime applied "without any showing that any facts in the publication sought to be suppressed pose a clear and present danger to the national security of the United States." Br. of the Reporters Committee for Freedom of the Press *3-4, *Snepp v. United States*, No. 78-1871, 1979 U.S. S. Ct. Briefs LEXIS 14 (U.S. June 25, 1979) (*Snepp* Reporters Committee Br.).

Plaintiffs are thus incorrect that the *Snepp* Court lacked occasion to consider the arguments raised here against prepublication review policies. Those arguments were before the Court; the Court just considered them unworthy of extensive discussion.

b. Plaintiffs (at 18-19) and the law-professor amici (at 11-15) also suggest *Snepp* does not govern because, in their view, it has become obsolete. Since *Snepp*, plaintiffs argue, "prepublication review has expanded on nearly every axis: the number of agencies that impose prepublication review requirements on former employees, the categories of former employees subject to prepublication review, the amount of information that is classified, the complexity of prepublication review regimes, the amount of material that is submitted for review, and the time taken to complete reviews." But none of those developments undercuts *Snepp*'s reasoning. And even if they are grounds on which plaintiffs could ask the Supreme Court to reconsider *Snepp*, they are not grounds on which this Court could properly abrogate *Snepp*. *Snepp* resolves this case.

B. Defendants' Policies Comply With The First And Fifth Amendments

Even if *Snepp* were not dispositive, plaintiffs fail to show any constitutional problem with defendants' policies.

1. *Snepp*'s reasonableness standard governs

At the least, *Snepp* makes clear that the relevant question is whether defendants' policies are "a reasonable means for protecting" the government's "vital interest" in safeguarding "both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." 444 U.S. at 509 n.3. Plaintiffs' arguments for a more stringent standard are unpersuasive.

a. Plaintiffs first suggest (at 20-23) that prepublication review policies are prior restraints, which "'bear[] a heavy presumption against … constitutional validity,'" *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam). That argument is inconsistent with *Snepp* and cases interpreting it.

Snepp makes clear that contractual restrictions on the speech of government employees and former employees are not prior restraints of constitutionally protected speech. Rather, "once a government employee signs an agreement not to disclose information properly classified pursuant to executive order, that employee 'simply has no first amendment right to publish' such information." *Wilson*, 586 F.3d at 183-184 (quot-

ing *Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003)); *see also, e.g.*, *id.* at 183 (prepublication review "is not … a 'system of prior restraints' in the classic sense"); *McGehee*, 718 F.2d at 1147-1148 (similar); *Lake James Cmty. Volunteer Fire Dep't, Inc. v. Burke County*, 149 F.3d 277, 280 (4th Cir. 1998) (citing *Snepp* for the proposition that "courts have routinely enforced voluntary agreements with the government in which citizens have … given up … the right to speak regarding government secrets"). Indeed, even before *Snepp*, this Court recognized that by agreeing to prepublication review, an employee "effectively relinquishe[s] his First Amendment rights" "[w]ith respect to [classified] information." *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir. 1975).

Plaintiffs invoke this Court's reference to prepublication review as "a system of prior restraint" in *Marchetti*, 466 F.2d at 1317. But *Marchetti* preceded *Snepp* by eight years, and its characterization of prepublication review is superseded by *Snepp*, as indicated by the Court's later decision in *Alfred A. Knopf*.[3] At any rate, *Marchetti* upheld the CIA's review regime.

Because prepublication review is not a prior restraint of protected speech, plaintiffs' attempts to invoke limits on prior restraints are meritless. Prepublication review policies need not satisfy the procedural restrictions set forth in *Freedman*, 380 U.S. at 58-

[3] Plaintiffs cite *United States v. Snepp*, 897 F.2d 138 (4th Cir. 1990)—a later appeal in which Snepp sought to modify the injunction the Supreme Court had affirmed—for the proposition that "*Marchetti*'s reasoning survived *Snepp*." Br. 22 n.3. But that decision reaffirmed *Marchetti*'s reasoning only as to whether authors bear the burden to seek judicial review of prepublication review decisions (*see infra* pp. 49-50); it did not reaffirm *Marchetti*'s characterization of prepublication review as a prior restraint.

59, or the requirement that "licensing authorit[ies]" be guided by "narrow, objective, and definite standards," *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969).

Rather, because prepublication review agreements are properly understood as contractual waivers of an employee's speech rights, the relevant question is whether they violate the unconstitutional conditions doctrine. That doctrine establishes that the government "may not deny a benefit" such as public employment "to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). In the context of public-employee speech, the doctrine takes the form of the balancing test prescribed by *Pickering v. Board of Education*, 391 U.S. 563 (1968), which weighs "the interests of the [employee], as a citizen, in commenting upon matters of public concern" against "the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568; *see Kirby v. City of Elizabeth City*, 388 F.3d 440, 446 (4th Cir. 2004); *see also Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (citing *Pickering* as an application of the unconstitutional conditions doctrine). As plaintiffs recognize (at 24), *Snepp*'s assessment of prepublication review as a "reasonable means for protecting" the government's national-security interests, 444 U.S. at 509 n.3, is an application of the *Pickering* standard. *See, e.g.*, *NTEU*, 513 U.S. at 465; *Weaver*, 87 F.3d at 1439. That standard applies equally here.

b. Plaintiffs invoke the modified version of the *Pickering* standard that the Supreme Court adopted in *NTEU*, which addressed a statute "prohibit[ing] federal employees from accepting any compensation for making speeches or writing articles," 513 U.S. at 457. When the government imposes a "statutory restriction on expression" by public employees, the Court held, it "must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government," and it "'must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.'" *Id.* at 468, 475. To the extent *NTEU* stands in tension with *Snepp*'s reasonableness analysis, however, this Court is bound by *Snepp*. "[W]hen Supreme Court precedent has 'direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [courts] should follow the line of cases which directly controls, leaving to [the Supreme] Court the prerogative of overturning its own decisions.'" *United States v. Danielczyk*, 683 F.3d 611, 615 (4th Cir. 2012) (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997)). And the Supreme Court itself invoked *Snepp*, just months after deciding *NTEU*, in *United States v. Aguilar*, 515 U.S. 593, 606 (1995).

At any rate, the distinctions between the *NTEU* and *Pickering* standards are irrelevant here for several reasons. *First*, although plaintiffs suggest that *NTEU* requires the Court to assess the burdens and benefits of prepublication review globally, rather than with respect to an individual employee, that is consistent with *Snepp*. There, the

Supreme Court affirmed the "reasonable[ness]" of the CIA's secrecy agreement as a general matter, not just its retrospective application to a single employee. 444 U.S. at 509 n.3. *Snepp*'s reasonableness standard equally encompasses the interests at stake here.

Second, while plaintiffs invoke *NTEU*'s requirement that a policy must mitigate actual harms, they are incorrect to assert (at 27-28) that "there is no evidence that inadvertent disclosure of classified information by former employees would be a significant problem in the absence of prepublication review." Plaintiffs' allegations disprove that assertion: Many of plaintiffs' own proposed publications were found upon review to contain classified information. *See supra* pp. 8-12. Plaintiffs believe some of the required redactions were unwarranted, but they do not claim *all* were unwarranted. And plaintiffs' lapses of judgment are unsurprising. *Snepp* explains that authors can easily make mistakes when they rely on their "own judgment about what information is detrimental" to national security, because they lack an agency's "broader understanding of what may expose classified information and confidential sources." 444 U.S. at 512.

Third, plaintiffs overstate the extent to which prepublication review burdens the legitimate interests of authors and the public. Prepublication review does not prevent authors from publishing, or the public from reading, works that are subject to review. It simply ensures that those works do not disclose classified or statutorily protected information. That is consistent with the First Amendment. *See, e.g.*, *McGehee*, 718 F.2d at 1143 ("The censorship of 'secret' information 'protect[s] a substantial governmental interest unrelated to the suppression of free expression.'").

Finally, to the extent plaintiffs suggest (at 26) that after-the-fact sanctions would be a more narrowly tailored way of achieving the "compelling interest" articulated by *Snepp*, 444 U.S. at 509 n.3, that is incorrect. Sanctions can "provide a strong incentive for former employees to be exceedingly careful in deciding what information to include in their manuscripts," as plaintiffs note (at 26). But as noted above, that incentive was not enough to stop some plaintiffs from including classified information in their proposed publications.

* * *

In sum, the relevant question here—to the extent it is not fully resolved by *Snepp*—is whether defendants' policies reasonably balance the interests of former government employees and the public with the government's "compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp*, 444 U.S. at 509 n.3. For the reasons discussed below, defendants' policies satisfy that standard.

2. The scope of defendants' prepublication review policies is neither overbroad nor impermissibly vague

Plaintiffs contend (at 32-37) that defendants' policies "are vague and overbroad" because (1) they "impose prepublication review requirements on all former employees," rather than "just those who had access to SCI," (2) they "subject these employees to

submission requirements that extend far beyond material that could plausibly be expected to contain classified information obtained in the course of government employment," and (3) they "use terms that are vague, undefined, and subjective." Those objections are unpersuasive.

a. Start with plaintiffs' contention that review must be limited to employees who had SCI access. As an initial matter, four of the five plaintiffs—the only four who expect to submit future publications—fall in that category. *See supra* pp. 8-12. More generally, plaintiffs fail to explain why review must be reserved for employees who had access to SCI as opposed to information classified at other levels. Even employees who were cleared only for Confidential materials had access to information the unauthorized disclosure of which "reasonably could be expected to cause damage to the national security," Exec. Order No. 13,526 § 1.2(a)(3); *see also id.* § 1.1(a)(4). The government surely has a compelling interest in preventing the disclosure of that information.

Plaintiffs suggest (at 6, 12) that employees who lacked *any* access to classified information might be subjected to review, but they show no realistic danger of that. Former NSA employees must submit publications where their "compliance with" the obligation not to publish classified or statutorily protected information "is in doubt" (JA114-115, 118-119, 120 (Policy 1-30 §§ 2, 6(b), 10(a)))—something that would likely be true only for employees who had access to such information. Indeed, with narrow exceptions, NSA employment uniformly requires a security clearance. 50 U.S.C. § 832(a). Virtually any former CIA employee who intends to publish material "that

mentions CIA or intelligence data or activities" (JA65-66 § 2(e)(1) (AR 13-10)), and any former ODNI employee who intends to publish material "that discusses the ODNI, the [Intelligence Community], or national security" (JA134 § 6 (Instr. 80.04)), will have had access to classified information. And DoD's policies state that, for former employees, the sole purpose of review is "to ensure that information they intend to release to the public does not compromise national security as required by their nondisclosure agreements" (JA91 § 1.2(g) (Instr. 5230.09))—which would require submissions only by employees who had access to classified information.

Plaintiffs rely (at 33) on other language in DoD policies, which they construe out of context to mean that former DoD employees must submit for review any DoD information "that pertains to military matters, national security issues, or subjects of significant concern to" DoD. But as the government's motion to dismiss explained (Dkt. 30-1 at 22), that language describes DoD's process of "security and policy review" (JA98 § 3 (Instr. 5230.29)), which is limited to information "prepared by or for DoD personnel" (JA103 § 1 (Instr. 5230.29, Encl. 3))—*i.e.*, *current* DoD employees and active-duty service members (JA93 § G.2 (Instr. 5230.09)).[4]

[4] At any rate, prepublication review could be reasonable even if applied to former employees who did not have access to classified information. *See Weaver*, 87 F.3d at 1443 ("[T]here is nothing unreasonable in the application of § 628.2 to all agency employees—even ones without direct access to classified information or sensitive foreign policy developments—because of the risk of unintended leakage of classified or other sensitive information.").

b. Plaintiffs are equally incorrect to argue (at 34-35) that defendants' policies "reach a vast amount of material that [d]efendants have no legitimate interest in reviewing." Plaintiffs seem to suggest (at 32) that the government has a "legitimate interest" in reviewing only "material that could plausibly be expected to contain classified information obtained in the course of government employment." But *Snepp*, and this Court's decisions, make clear that the government's interest is not so narrow.

The agreement approved in *Snepp*—which extended to the publication of "any information or material relating to the [CIA], its activities[,] or intelligence activities generally," 595 F.2d at 930 & n.1—is materially similar to the policies here. Plaintiffs make no effort to square their criticism of defendants' submission requirements (at 34-35) with the Supreme Court's approval of a similar requirement. And as discussed above, the *Snepp* Court was confronted with the argument—like plaintiffs' here—that the agreement at issue was invalid because it applied "without any showing that any facts in the publication sought to be suppressed pose a clear and present danger to the national security of the United States." *Snepp* Reporters Committee Br. *3-4; *see* Snepp Pet. *14-15. The Supreme Court simply disagreed.

As the Court explained, prepublication review protects the government's prerogative to make its *own* judgments about the information in a proposed publication, without relying on the potentially flawed, self-interested, or uninformed judgment of employees, who may believe a publication is innocuous when it is not. 444 U.S. at 512. That requires a broad submission standard. Indeed, plaintiffs acknowledge (at 34) that

prepublication review can legitimately encompass "speech that goes beyond what the government may constitutionally punish after the fact." Plaintiffs criticize the breadth of defendants' policies but make no effort to articulate what standards they believe would be legitimate while still protecting the governmental interest identified in *Snepp*.[5]

Nor do plaintiffs justify their claim that review must be limited to information obtained during a former employee's service. The *Snepp* agreement contained no such limitation. And in *Alfred A. Knopf*, this Court explained that a former government employee should not "be heard to say that he did not learn of information during the course of his employment if the information was in the [agency where he worked] and he had access to it," partly because a person's "recollection" of how he learned a particular piece of information is "fallible." 509 F.2d at 1371. This Court had previously written in *Marchetti* that "the Government's need for secrecy … lends justification to a system of prior restraints against disclosure by employees and former employees of classified information obtained during the course of employment," 466 F.2d at 1316-1317. But the Court did not hold that the Constitution required limiting review to information obtained during employment. It was simply describing the obligation at

[5] Nor did the House and Senate Intelligence Committees articulate—in nonbinding comments accompanying a 2017 bill—how they would identify "those materials that might reasonably contain or be derived from classified information obtained during the course of an individual's association with the" intelligence community, 163 Cong. Rec. H3300 (daily ed. May 3, 2017); *see* 163 Cong Rec. H3298 (comments had the effect of "a joint explanatory statement of a conference committee"); 163 Cong. Rec. S2747, S2750 (daily ed. May 4, 2017) (same).

issue in *Marchetti*, which arose from an agreement limited to "information learned by [CIA employees] during their employment and in consequence of it," *Alfred A. Knopf*, 509 F.2d at 1371 (describing the agreement in *Marchetti*).

c. Finally, plaintiffs contend (at 35-36, 46-49) that defendants' policies are insufficiently specific about what must be submitted. Plaintiffs object, for example, to the CIA's mandate to submit material that "might be based on" information the employee knows is classified or in the process of a classification determination (JA54 ¶ 5)), as well as Form 313's similar requirement (JA127-128 ¶ 5), to the NSA's requirement to submit materials that might disclose information not "approved for public release" (JA118 § 6(b)), and to Form 4414's requirement to submit any publication "that contains or purports to contain any SCI or description of activities that produce or relate to SCI or that [authors] have reason to believe are derived from SCI" (JA143 ¶ 4).[6]

But there is no problematic degree of ambiguity in the policies. The "might be based on" language simply captures the fact that authors must submit materials potentially informed by their background knowledge of classified information, even where they cite public sources. NSA's "approved for public release" language refers, as noted above, to the fact that NSA is statutorily authorized to withhold certain intelligence

[6] Plaintiffs also object to the purported requirement for former DoD employees to submit material "that 'relates to information in the custody and control of the [agency]' if it 'pertains to military matters, national security issues, or subjects of significant concern to [the agency].'" Br. 35 (emphasis omitted). But that requirement pertains to DoD's "security and policy review," which does not apply to former employees. *See supra* p. 37.

information whether or not it is classified. And Form 4414's language is not materially different from that of the *Snepp* agreements, which required employees "not to publish … any information or material relating to the Agency, its activities[,] or intelligence activities generally," or "any information concerning intelligence or CIA." 595 F.2d at 930 nn.1 & 2. Again, plaintiffs fail to explain how the standards could be narrower or more precise while serving their "vital" function, *Snepp*, 444 U.S. at 509 n.3.

If former employees are uncertain whether a publication falls within their review obligations, moreover, they can resolve that uncertainty by contacting their former agency. In *Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973), the Supreme Court rejected a vagueness challenge to the Hatch Act's prohibitions on political activity by federal employees, partly because the Civil Service Commission had "established a procedure by which an employee in doubt about the validity of a proposed course of conduct may seek and obtain advice from the Commission and thereby remove any doubt there may be as to the meaning of the law." *Id.* at 580; *see also McGehee*, 718 F.2d at 1145 (relying on this holding in rejecting a vagueness challenge to the guidelines for classifying information). The availability of guidance similarly mitigates any vagueness concern here.

3. Defendants' prepublication review standards are neither overly restrictive nor impermissibly vague

Plaintiffs next challenge (at 37-38) the standards by which defendants review proposed publications. Those arguments are equally unpersuasive.

a. Plaintiffs are incorrect to suggest (at 38-39, 42, 49-51) that defendants' review standards are vague or subjective. The nondisclosure agreements clearly specify the purposes of review. *See* JA143 (Form 4414 ¶ 5) (review serves "to give the United States a reasonable opportunity to determine whether the" material in question "sets forth any SCI"); JA54 (CIA Secrecy Agreement ¶ 6) (review serves "to give the [CIA] an opportunity to determine whether the information or material" contemplated for public disclosure "contains any information or material that [the employee has] agreed not to disclose"); JA128 (Form 313 ¶ 6) (similar).

Defendants' policies are equally clear in specifying the purposes of review. The CIA's policy, for example, states that the Publications Review Board will review proposed publications by former employees "solely to determine whether [they] contain[] any classified information" (JA67 § 2(f)(2)), and DoD's policy states that, for "former DoD employees and contractors," review serves "to ensure that information they intend to release to the public does not compromise national security as required by their nondisclosure agreements" (JA91 § 1.2(g) (Instr. 5230.09)).[7] The NSA and ODNI policies specify the review standards in slightly broader terms, but they are no less clear. As noted above, NSA's "approved for public release" language (JA114 § 2(c)) simply reflects NSA's statutory authorization to withhold certain intelligence information

[7] Plaintiffs again refer (at 38, 42, 49) to DoD standards inapplicable to former employees. *See supra* p. 37, p. 40 n.6.

whether or not it is classified. And ODNI's policy language, stating that publications are reviewed "to safeguard sensitive intelligence information and prevent its unauthorized publication" (JA134 § 6), reflects the same type of authorization, *see supra* p. 2.[8]

In short, defendants' review standards do not resemble the examples plaintiffs invoke (at 49). They do not "vest[] essentially unbridled discretion in a government decisionmaker to restrict speech on the basis of the viewpoint expressed," *Sanjour v. EPA*, 56 F.3d 85, 96 (D.C. Cir. 1995) (en banc), nor are they comparable to a rule "allowing warrantless wiretapping whenever the activities of domestic groups incur the wrath of a foreign power or affect in any manner the conduct of our foreign affairs," *Zweibon v. Mitchell*, 516 F.2d 594, 654-655 (D.C. Cir. 1975) (plurality op.).[9]

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[8] Plaintiffs cite (at 42, 49) language in ODNI's policy stating that the goals of review are "to prevent the unauthorized disclosure of information[] and to ensure the ODNI's mission and the foreign relations or security of the U.S. are not adversely affected by publication." But that language comes from the "purpose" section of the policy (JA133 § 3); it does not state the review standard. ODNI's mission-related review applies only to current employees publishing in their official capacity; it entails a review of *official-capacity* publications for "consisten[cy] with the official ODNI position or message." JA135 § 6(A)(3).

[9] Plaintiffs cursorily assert (at 50-51) that "former intelligence-agency employees who wrote books criticizing" CIA policies "have had their books heavily redacted while former CIA officials' supportive accounts of the same policies were published without significant excisions of similar information," but the complaint's equally conclusory allegation to that effect (JA20-21 ¶ 34) does not plead a sufficient factual basis for the accusation to be plausible. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It does not even identify the former employees in question, much less substantiate the assertion that the information one group was allowed to publish was "similar" to the information redacted from the other group's books. At any rate, any isolated misapplication of defendants' policies, as alleged by plaintiffs or the law-professor amici, would at most

b. Plaintiffs suggest (at 37-42) that defendants' standards are overbroad because they allow defendants to prevent the publication of information "(1) whether or not it was obtained by the author in the course of employment; (2) whether or not its disclosure would actually cause harm; (3) whether or not it is already in the public domain; and (4) whether or not the public interest in its disclosure outweighs the government's interest in secrecy." Those objections fail for several reasons.

First, it is appropriate for agencies to require the removal or alteration of references to classified information that has entered the public domain improperly, such as through leaks or hacking. That is clear from this Court's decision in *Alfred A. Knopf*, which explains that classified information is not free from restrictions unless "there ha[s] been *official* disclosure of" the information by the government. 509 F.2d at 1370 (emphasis added); *see also, e.g.*, *Wilson*, 586 F.3d at 186 (explaining the "'critical difference between official and unofficial disclosures'" (quoting *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990)).

That rule exists for good reason. When classified information enters the public domain through theft or hacking, its veracity is unconfirmed. "The reading public is accustomed to treating reports from uncertain sources as being of uncertain reliability," so the "republication" of leaked or stolen information "by strangers to it lends no ad-

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justify a challenge to the particular redactions in question—not plaintiffs' systemic effort to invalidate the policies.

ditional credence to it." *Alfred A. Knopf*, 509 F.2d at 1370. But when a former government employee republishes the information, as someone "in a position to know of what he [speaks]," the "republication of the material … lend[s] credence to it." *Id.* That is why defendants reserve the right to forbid the publication of information that entered the public domain improperly. *See* JA68 (CIA AR 13-10 § 2(f)(4)); JA115 (NSA Policy 1-30 § 3(b)); JA128 (Form 313 ¶ 6).[10]

Second, and for essentially the same reason, agencies can properly bar former employees from republishing classified information even where they learned the information outside their employment. Because readers may naturally assume that the former employee learned the information through her employment, even when she did not, such publications risk appearing to confirm unauthorized disclosures. As discussed above (at 39), moreover, the agreement upheld in *Snepp* was not limited to information learned during employment, 595 F.2d at 930 & n.1. And in *Alfred A. Knopf*, this Court explained that former employees should be presumed to have learned all the classified information to which they had access, even if they claim to have learned a particular piece of information from a public source. 509 F.2d at 1371.

Third, defendants do not assert the right to prevent the publication of information "whether or not its disclosure would actually cause harm," or "whether or not

[10] Plaintiffs suggest (at 39) that DoD "asserts the authority to censor … unclassified information," as opposed to classified information that has improperly entered the public domain, but it again relies on policies inapplicable to former employees. *See supra* p. 37, p. 40 n.6, p. 42 n.7.

the public interest in its disclosure outweighs the government's interest in secrecy" (Br. 37-38). They assert the right to prevent publication of classified information and narrow categories of statutorily protected national-security information. If information is properly classified, then its disclosure *is* reasonably expected to "cause damage to the national security," Exec. Order No. 13,526 § 1.2(a)(3); *see id.* § 1.1(a)(4), and measures to prevent its disclosure are consistent with the First Amendment, *e.g.*, *McGehee*, 718 F.2d at 1143. The same is true if Congress has determined that national-security information warrants protection.[11]

What plaintiffs appear to mean is that defendants may sometimes require the removal of information that plaintiffs believe is *improperly* classified. *See* Br. 40. But plaintiffs cannot invalidate the entire system of prepublication review on the theory that some information is classified improperly. As an initial matter, this Court has explained that classification decisions are governed by the "presumption of regularity in the performance by a public official of his public duty," *Alfred A. Knopf*, 509 F.2d at 1368, and the D.C. Circuit has likewise recognized the "deference" owed to an agency's "technical expertise and practical familiarity with the ramifications of sensitive information," *McGehee*, 718 F.2d at 1148. "Due to the 'mosaic-like nature of intelligence

[11] Plaintiffs cite (at 40) Justice Stewart's concurring opinion in *New York Times*, which suggests that a prior restraint is appropriate only where a "disclosure … will surely result in direct, immediate, and irreparable damage to our Nation or its people," 403 U.S. at 730. That standard does not apply where a secrecy agreement forbids the disclosure of classified information. *See, e.g.*, *McGehee*, 718 F.2d at 1147 n.22 (distinguishing prepublication review from prior restraints).

gathering,' … '[w]hat may seem trivial to the uninformed[] may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in context.'" *Id.* at 1149 (citations omitted). At any rate, authors can properly challenge classification decisions by seeking judicial review of individual prepublication review determinations, which plaintiffs declined to do.

c. Plaintiffs also suggest in passing (at 43) that the "practice of cross-agency referrals exacerbates the … constitutional deficiencies" of defendants' policies. But no agency has a constitutionally deficient policy, for the reasons discussed above, and plaintiffs fail to explain why the referral of a proposed publication from one constitutionally sufficient system to another poses an independent constitutional concern.

4. Defendants' prepublication review policies afford adequate procedural safeguards

Finally, plaintiffs are incorrect to suggest (at 43-45) that defendants' policies lack procedural safeguards.

a. All four agencies specify a target timeline for review. The CIA states that, "[a]s a general rule, the [Publications Review Board] will complete prepublication review … within 30 days of the receipt of material," that "[r]elatively short, time-sensitive submissions" such as op-eds "will be handled as expeditiously as practicable," and that "[l]engthy or complex submissions may require a longer period of time for review." JA65 § 2(d)(4). DoD advises authors to submit "papers and articles … at least 10 working days before" the anticipated publication and "[m]anuscripts and books … at least

30 working days" in advance. JA105 § 3(a). NSA states that it "shall, as practicable," complete its review "within 25 business days" of receiving a submission. JA119 § 6(b)(7). And ODNI states that it "will complete a review of non-official publication requests no later than 30 calendar days from the receipt of the request, as priorities and resources allow." JA136 § 6(C)(2)(b) (emphasis omitted).

Plaintiffs' allegations suggest that, by and large, the agencies adhere to those timelines. All plaintiffs except Bhagwati have submitted numerous works for prepublication review, and they identify no pattern of delay. *See* JA30 ¶ 61 ("blog posts and op-eds"); JA33 ¶ 72 ("book manuscripts, articles, papers, public talks, and academic syllabi"); JA37-38 ¶¶ 85, 87 ("multiple works," including "nine books"); JA43 ¶ 103 ("many" publications). Indeed, plaintiff Goodman alleges that "most of" his books "took less than two months" to review. JA38 ¶ 89. And even the books on which plaintiffs focus their allegations did not take an exceptionally long time to review. *See* JA31 ¶¶ 63-64 (three months for ODNI review); JA34-35 ¶ 75 (six months for ODNI review); JA38 ¶ 89 (eleven months for CIA review); JA44-45 ¶¶ 108, 110 (seven months for DoD review, including referrals).

Plaintiffs would prefer for agencies to be bound by a definitive thirty-day timeline for an initial review, but that is impossible—and certainly not constitutionally required—in a world of limited agency resources, where (as plaintiffs note) the volume of submitted material has grown significantly over the years. In *United States v. Bolton*, 2020 WL 3401940 (D.D.C. June 20, 2020), for example, the district court described a

review process that extended beyond four months as "reasonable," while noting that "[m]any Americans are unable to renew their passports within four months." *Id.* at *3. Plaintiffs rely on this Court's statement in *Marchetti* that "the CIA must act promptly"—within "thirty days"— to "approve or disapprove any material which may be submitted to it *by Marchetti*." 466 F.2d at 1317 (emphasis added). As the language of the opinion reflects, however, the thirty-day timeline was meant to refer to the CIA's review of material submitted by a particular author who had brought suit. It did not impose a general thirty-day deadline on the CIA's review process.

b. To the extent authors believe that review is taking too long, moreover, they can sue to compel the agency to complete the process. *See, e.g.*, *Bolton*, 2020 WL 3401940, at *3 ("Bolton could have sued the government" rather than "opt[ing] out of the review process before its conclusion"); *Bakos*, 2019 WL 3752883 (parties negotiated resolution after suit was brought). Plaintiffs claim that judicial review—either of an agency's failure to complete review in a timely manner or of its refusal to allow the publication of certain information—is insufficiently speedy. But they plead no facts from which the Court could draw that inference; indeed, none of the plaintiffs brought a judicial challenge to a prepublication review process. Agencies and courts can and do move quickly when necessary.

Plaintiffs also suggest (at 44) that the government should have the burden of bringing suit to enforce a prepublication review determination, as opposed to the author's needing to seek review of such a determination. But this Court rejected that

argument both in *Marchetti*, 466 F.2d at 1317, and in *United States v. Snepp*, 897 F.2d 138 (4th Cir. 1990), where Snepp sought to modify the injunction the Supreme Court had affirmed a decade earlier. Plaintiffs attempt (at 45) to distinguish *Marchetti*, on the unpersuasive ground that this Court did not understand how prepublication review would be used, but do not address the 1990 decision in *Snepp*.

c. Plaintiffs' procedural arguments boil down to the claim that they are burdened by the delay required for prepublication review. Any delay undeniably hinders speech, and "even a short waiting period might in some cases affect the relevance of information of immediate or pressing interest," *Weaver*, 87 F.3d at 1442. But those who accept the privilege of serving our country—and the responsibility of access to the classified information necessary to do so—do not "have a transcendent interest in instant publication of statements made on agency-related matters." *Id.* They agree to compromise the immediacy of their speech to serve the "compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp*, 444 U.S. at 509 n.3. The compromises they are asked to make are constitutional so long as they are "reasonable," *id.* And plaintiffs have shown no basis to conclude that defendants' policies are unreasonable.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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October 23, 2020

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This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,973 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in 14-point Garamond, a proportionally spaced typeface.

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